

In re) Fair Hearing No. 10,758
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Appeal of)

The petitioner appeals the Department's denial of her application for ANFC based on her alleged failure to demonstrate parental deprivation.

1. On August 30, 1991, the petitioner filed a complaint for relief from abuse on behalf of herself and her two children against her husband in the Orleans Family Court. Based on her allegations that her husband had caused physical harm to herself, had abused her children (a boy and a girl from a previous marriage) and had placed her in fear of imminent serious physical harm, the court made a finding as such and made a temporary order requiring the petitioner's husband to leave the premises until a full hearing could be held on September 9, 1991.

2. Pursuant to that order, the petitioner's husband left their apartment and moved in with a young man who lived across the street whom both the petitioner and her husband refer to as their "nephew" although his relationship is actually somewhat more distant.

3. Just a few days later, the petitioner's husband

and his "nephew" decided to move to an apartment house on another street. The petitioner's husband was shown two vacant units one upstairs with one bedroom and one downstairs with two bedrooms which were connected by a stairway in an interior hallway. The petitioner's husband decided to rent the cheaper upstairs unit.

4. Almost immediately, either the petitioner's husband or the "nephew" told the petitioner about the availability of the downstairs unit. The petitioner looked at the apartment and decided to take it.

5. The petitioner stated she wanted to move from her old apartment because the electricity in her apartment was too much, and because she thought she needed three bedrooms.

She offered this as a rationale for moving to the new apartment. However, there was no evidence that she knew what the electricity would be in this new unit and the unit was only two bedrooms. The rent in the new apartment, however, was somewhat cheaper.

6. The petitioner and her two children moved to the downstairs apartment with the help of her husband the week after he moved in. She has paid the rent herself with the assistance of the General Assistance program. Shortly after her move, her son decided to move in with his biological father. The remaining official tenants in this two bedroom apartment were the petitioner and her daughter.

7. The petitioner did not follow through with the permanent hearing on September 9, 1991, on her restraining

order. She says it is because she was not really afraid of her husband and wanted a chance to talk with him.

8. Based upon what she claims is her separation from her husband, the petitioner applied for ANFC for herself and her daughter. When asked to verify the separation on September 10 or 11, the petitioner said that she did not know where her husband was. When the worker confronted her with the fact (testified to at hearing by an eyewitness) that the petitioner was seen using her husband's car she replied that she got it through her "nephew" who acted as a go between. Finally on September 16, 1991 the petitioner supplied a statement from her husband revealing that he lived in the same building in a different apartment. Because her worker had an eyewitness account (testified to at hearing) that the petitioner and her husband were seen together in the late evening grocery shopping and because documents in the Department's possession indicate that the petitioner has gotten restraining orders against her husband before only to let him move back in within a month, she concluded that they were likely living together and denied the application for ANFC on September 20, because "neither parent of your children is absent from the home".

9. The petitioner and her husband both claim that they are not living in the same unit, that he gives her no money and that their relationship has changed. As they have only one car, they must both use it and go on errands together. Beyond that, they agree on little. When

questioned separately, the petitioner claimed that after their separation she didn't know where her estranged husband was and thought he was leaving the state. She claims not to have known that her husband was living in the new apartment house when she decided to rent there and found out for the first time some days after she moved in when she ran into him in the driveway. Her husband, whom she had called as a witness, claimed on the other hand that he spoke with her again only a few days after the order was issued and that he or his "nephew" had informed her of the availability of an apartment below theirs and helped her to move there. The petitioner claims her husband visits for about an hour each day but not for meals while he says he visits only once or twice per week for coffee or meals.

10. Because there are so many blatant inconsistencies in the testimony given by the petitioner and her husband, because the petitioner offered some inconsistent reasons for moving to the apartment and because such an obvious attempt was made by the petitioner to conceal the evolution and existence of their living situation, first from the worker, and then from the hearing officer, it cannot be found that the petitioner's testimony with regard to the true nature of their relationship is credible. Therefore, it cannot be found based on the petitioner's testimony that her husband's relationship to the family has changed in any significant way.

ORDER

The decision of the Department is affirmed.

REASONS

In order to be categorically eligible for ANFC, the person applying must demonstrate that the children to be assisted are deprived of parental support by virtue of the absence of a parent. W.A.M. § 2330, Fair Hearing Rule No. 12. Absence of the parent is described in the regulations as follows:

Continued Absence of Parent

Continued absence of a parent refers to physical absence of a parent from the home for one of the following reasons, the nature of which interrupts or terminates the parent's functioning as a provider of maintenance, physical care or guidance for the child:

. . .

3. Informal separation of parents without benefit of legal action.

. . .

W.A.M. § 2331

As the Board has repeatedly stated, "absence" under the above definition is normally established wherever one parent does not reside with the other. Fair Hearing No. 9405. However, when, as here, evidence is strong that the parents' alleged "separation" is contrived, the Board has looked to the relationship of the parents to each other and to the question of how the "absence" itself, affects the degree of support, care and guidance the allegedly-absent parent provides for the child. See Fair Hearings No. 8869, 8774,

8427, 6877, and 6111.

In this case, the petitioner and her husband after actually separating for a week or two moved to the same house in apartments stacked on top of each other. The petitioner simultaneously also abandoned her efforts to get a restraining order. While this situation alone does not conclusively indicate a lack of absence, it does raise a strong suspicion of contrivance and puts the burden on the petitioner to show that the relationship of her husband to the child remaining in the household has changed because of this situation. The petitioner has failed to meet that burden and that failure is in large part because she has demonstrated through her inconsistencies and her attempts to conceal the true facts of her residence that her testimony regarding her relationship is not worthy of belief.

Although it does appear that the two are actually renting and paying for separate apartments (the husband along with the "nephew"), there is no credible evidence that the husband does not reside much as before with the petitioner and that the child is not continuing to receive the same degree of care and guidance as before. And, of course, although the petitioner's husband claims he is not giving her any money, his obligation to financially support his family continues whether he is upstairs or downstairs until such time as a court relieves him of the obligation. His refusal to give the child money cannot in and of itself, without an actual physical absence as well, establish the

"absence" contemplated by the regulations.

It is not totally implausible that the petitioner is trying to establish a separate household from her husband and her only motivation in moving to the same house was for the cheaper rent. If that were her real motivation, she would not be required to continue to have contact and to rely on a person for support while she is trying to separate from him and would be found eligible for ANFC. However, by moving right next to her allegedly estranged husband with little or no rational explanation, the petitioner has put herself in a position which she alone can undo either by getting physically away from her husband and/or seeking legal protection or separation from him. Until one of these actions occurs, it cannot be concluded from the facts as they exist now that the petitioner's husband is "absent" from the home within the meaning of the regulations.

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